IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1161

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., REGULAR COMMON CARRIER CONFERENCE, COMMON CARRIER CONFERENCE-IRREGULAR ROUTE AND ASSOCIATION OF AMERICAN RAILROADS,

Petitioners,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on November 24, 1976.

CITATIONS TO OPINIONS BELOW

The Report and Order of the Interstate Commerce Commission (ICC or Commission), served April 10, 1975 in Docket No. MC-C-8200, *Sunkist Growers, Inc., Petition for Declaratory Order—"Member Transportation,"* appears in Appendix A hereto, and is recorded

in the official reports of the Commission at 121 M.C.C. 448. The Order of the Commission served August 1, 1975 denying petitioners National Motor Freight Traffic Association, Inc. (NMFTA), Regular Common Carrier Conference (RCCC), and Common Carrier Conference-Irregular Route (CCC-IR) petition for reconsideration appears in Appendix B hereto, while the Commission's Order served September 5, 1975, denying those same petitioners' petition for a finding of general transportation importance appears in Appendix C hereto. Neither of these orders are recorded in the official reports of the Commission. The judgment of the Court of Appeals affirming the Commission Order served April 10, 1975, and the Memorandum of the dissenting judge appear in Appendix D hereto, but are not recorded in the official reports of that Court.

JURISDICTION

The judgment of the Court of Appeals printed in Appendix D hereto was entered on November 24, 1976. The jurisdiction of this Court is invoked under Sections 1254(1) and 2350(a) of Title 28 of the United States Code.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erroneously interpreted the Agricultural Marketing Act and the Interstate Commerce Act so as to confer a regulatory exemption intended solely for the benefit of "producers of agricultural commodities" upon nonfarmer wholesalers, jobbers and chain stores not entitled to membership in an agricultural cooperative association?

2. Whether the Court of Appeals misapplied the standards established by this Court in *United States* v. *Pacific Coast Wholesalers' Ass'n.*, 338 U.S. 689 (1950), by holding that the *Pacific Coast* decision contemplates that no legal significance be attached to the term of sale "f.o.b. packinghouse (origin)" in determining whether the transportation performed by an agricultural cooperative qualifies as "member transportation"?

STATUTORY PROVISIONS

The statutory provisions involved in the case are cited below and set forth in Appendix E hereto. The provisions are:

(1) Agricultural Marketing Act:
Section 1141j(a), 12 U.S.C. § 1141j(a).

(2) Interstate Commerce Act:
Section 203(b)(5), 49 U.S.C. § 303(b)(5).
Section 402(c), 49 U.S.C. § 1002(c).

(3) Interstate Commerce Commission Regulations:
49 C.F.R. §§ 1047.20(c), (d), (f) and (g).

STATEMENT OF THE CASE

This action is brought to review an Order of the Interstate Commerce Commission finding that shipments of citrus fruits made on an f.o.b. packinghouse (origin) basis by a member of an agricultural cooperative association, which are carried in interstate commerce in motor vehicles controlled and operated by that association, constitute member transportation within the meaning of Section 203(b)(5) of the Interstate Commerce Act, 49 U.S.C. § 303(b)(5).

Petitioners NMFTA, RCCC and CCC-IR are three national organizations of common carriers of property by motor vehicle operating in interstate commerce

under certificates of public convenience and necessity issued by the ICC. Their combined memberships comprise virtually all of the regulated motor common carriers which perform interstate transportation of general commodities throughout the continental United States. Each organization is charged under its charter and by-laws with the duty of protecting the interests of its members, and from time to time institutes or participates in administrative and judicial proceedings concerning the status or operating practices of persons engaged in performing transportation or in rendering transportation services in competition with its members. In *National Motor Freight Traffic Ass'n* v. *United States*, 372 U.S. 246, 247 (1963), this Court held that said petitioner performed "significant functions in the administration of the Interstate Commerce Act," and has standing to represent its members in judicial proceedings in which the validity of the actions of administrative agencies is at issue.

Petitioner Association of American Railroads is a voluntary, unincorporated, non-profit organization composed of member railroad companies operating in the United States, Canada and Mexico. These railroad companies operate about 97 percent of the total mileage and have approximately 97 percent of the total operating revenues of all railroads in the United States. The AAR is the joint representative and agent of these railroads in connection with legal matters of common concern to the railroad industry as a whole. It has a significant interest in interpretations of federal legislation that affect the ability of the railroads to effectively compete for available traffic.

Under Section 203(b)(5) an exemption is provided for motor vehicles controlled and operated by a co-

operative association, as defined by the Agricultural Marketing Act, 12 U.S.C. § 1141. Certain transportation activities can be conducted thereunder free from the ICC's licensing or economic regulation. Included are interstate transportation services which are conducted in direct competition with those provided by petitioners' members.

The ICC Proceeding

The ICC proceeding was instituted in response to a petition filed by Sunkist Growers, Inc., (Sunkist) on November 8, 1973, seeking, pursuant to Section 554(e) of the Administrative Procedure Act, 5 U.S.C. § 554 (e), an ICC Order declaring that shipments made on an f.o.b. packinghouse basis by a member of an agricultural cooperative association, which are carried in interstate commerce in motor vehicles controlled and operated by that agricultural cooperative association, constitute member transportation within the meaning of the provisions of Section 203(b)(5).

Sunkist alleged that it is a cooperative association engaged in the promotion, marketing, and distribution of fresh citrus fruits in interstate commerce for its approximately 8,500 grower members. Sales of members' fresh citrus fruits are made to various customers, including wholesalers, jobbers and chain stores. The terms of sale, as pertinent to this litigation, are f.o.b. packinghouse (origin), with title to the commodities and all risks and responsibility for the transportation charges passing to the customers at that point. Under that arrangement, Sunkist sometimes selects the carrier and specifies the routing to be observed in transporting the customers' shipments. The ICC was requested to determine whether, if Sunkist joins another agricul-

tural cooperative association providing transportation facilities, the transportation of f.o.b. origin shipments tendered by Sunkist would constitute "member transportation" within the intendment of Section 203(b)(5) for that agricultural cooperative association.

Notice of the petition was published in the Federal Register, and interested parties were invited to file written representations, views or arguments in support of or in opposition to the sought declaratory relief. Various interested parties, including petitioners NMFTA, RCCC and CCC-IR, submitted written statements in response to that invitation. Those petitioners opposed the interpretation of the term "member transportation" urged by Sunkist contending that because the consignee wholesalers, jobbers and chain stores are not "producers of agricultural commodities," *i.e.*, nonfarmers, they are neither entitled to membership in a cooperative association nor are they of the class of persons Congress intended to benefit in enacting Section 203(b)(5). Accordingly, Sunkist is unable to assert its cooperative status, valid only as to its grower members, for their benefit; and another cooperative association providing transportation services for those shipments could not include that traffic within "member transportation." Further, those petitioners argued that including such nonmember traffic within the "member transportation" category would unlawfully broaden the 15 percent limitation imposed by Section 203(b)(5) on the nonmember, nonexempt transportation services a cooperative association can perform in any fiscal year. As those transportation services are performed in direct competition with regulated common carriers, that unlawful broadening would adversely affect petitioners' members by the unwarranted diversion of traffic from them.

In its Report served April 10, 1975, the ICC, Division 1, concluded that Sunkist is qualified for membership in an agricultural cooperative association as defined in Section 203(b)(5) of the Interstate Commerce Act, and that were Sunkist to join such cooperative association, shipments of packed citrus fruits sold f.o.b. its packinghouse would constitute "member transportation" within the meaning of the statute.

The ICC rejected the contention that shipments made f.o.b. packinghouse are made for nonmember consignees, and, therefore, constitute nonmember transportation. Noting that nothing in Section 203(b)(5) of the Act, its legislative history, implementing regulations, or subsequent Commission and court decisions deals precisely with this issue, the ICC inferred, wholly on the basis of certain language utilized by this Court in *United States* v. *Pacific Coast Wholesalers' Ass'n.*, 338 U.S. 689 (1950), (hereinafter referred to as *Pacific Coast*), a case dealing with the exemption afforded shippers' associations under Section 402(c) of the Interstate Commerce Act, that "the apparent intention of the Congress" was not to have the exemption provided in Section 203(b)(5) turn on the type shipment involved, *i.e.*, f.o.b. origin or f.o.b. destination. The traffic was thus found to constitute "member transportation" as defined in 49 C.F.R. § 1047.20(f).

By Order served August 1, 1975, Division 1, acting as an Appellate Division, denied petitioners NMFTA, RCCC and CCC-IR petition for reconsideration. That order rendered the proceeding administratively final and ripe for judicial review. As the issue presented was one of first impression for the ICC, and the determination thereof would have an adverse impact on the entire regulated common carrier industry, those same

petitioners filed a petition seeking a finding that an issue of general transportation importance was involved so that the full Commission could consider this vital matter. The ICC, by Order served September 5, 1975, denied the petition.

On September 22, 1975, petitioners NMFTA, RCCC and CCC-IR filed a petition for review of the Commission decision with the United States Court of Appeals for the District of Columbia Circuit. Petitioner Association of American Railroads intervened in support of the motor carrier petitioners and Sunkist Growers, Inc., intervened in support of the United States and the Interstate Commerce Commission. Jurisdiction in that Court was founded on Section 2342(5) of Title 28 of the United States Code, 28 U.S.C. § 2342 (5), which empowers United States Courts of Appeals to review ICC orders. Venue in that Court was founded on Section 2343 of Title 28 of the United States Code, 28 U.S.C. § 2343. In a split decision, the Court of Appeals, *per curiam*, affirmed the Commission. In reaching its decision the Court relied on the same language from the *Pacific Coast* case as had been relied upon by the ICC.

In his dissent, Judge Tamm urged that the majority's conclusion was contrary to the legislative intention underlying both the Agricultural Marketing Act, 12 U.S.C. § 1141 and Section 203(b)(5) of the Interstate Commerce Act. Judge Tamm also found that the majority opinion was not in accord with this Court's opinion in *Pacific Coast*.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals Has Decided an Important Question of Federal Law in a Manner Which Conflicts with the Proper Construction of the Congressional Mandate

By permitting an agricultural cooperative association to transport as "member transportation" the traffic of nonfarmer wholesalers, jobbers and chain stores not qualified for membership in an agricultural cooperative, the Court of Appeals has thwarted the expressed intent of Congress regarding the bona fide activities such organizations conduct under the Agricultural Marketing Act, 12 U.S.C. § 1141 and Section 203(b)(5) of the Interstate Commerce Act. The practical result of that decision is to undermine the protection that Congress intended the regulated carrier industry to have from the unregulated competition resulting from the exempt transportation operations conducted by cooperative associations under Section 203(b)(5).

The decision of the Court of Appeals fails to recognize that the statutory scheme under which an agricultural cooperative provides unregulated transportation services in competition with and to the direct economic detriment of regulated carriers was designed to benefit farmers only. Judge Tamm's dissent to the opinion of the Court of Appeals properly noted that:

> The legislative intent behind the Agricultural Marketing Act was to encourage the organization and operation of farm cooperatives so that farm products could be effectively merchandised. 12 U.S.C. § 1141 (1970); *Northwest Agricultural Cooperative Ass'n* v. *ICC*, 350 F. 2d 252 (9th Cir.

1965), *cert. denied,* 382 U.S. 1011 (1966). The benefits derived from such cooperatives were meant to run directly to the member farmers. 12 U.S.C. § 1141j(a) (1970). (Dissenting Memorandum, p. 1).

The Agricultural Marketing Act expressly provides that cooperative associations are to be operated "for the mutual benefit of the members thereof . . ." and "shall not deal in farm products, farm supplies and farm business services with or for nonmembers in an amount greater in value than the total amount of such business transacted by it with or for members." 12 U.S.C. § 1141j(a) The latter requirement is interpreted as a limitation on a cooperative's activities. *Munitions Carriers Conference, Inc.* v. *American Farm Lines,* 415 F. 2d 747 (10th Cir. 1969). The obvious intention of Congress then was to require that the primary business activity of a cooperative association, including transportation activities conducted under the Section 203(b)(5) exemption, be conducted *for* its farmer members. See *I.C.C.* v. *All-American Association,* 281 F. Supp. 18 (N.D. Tex. 1968).

Further, the ICC has heretofore consistently interpreted Section 203(b)(5) so as to recognize that the exemption was not designed to become a vehicle by which cooperative associations could become competitors of regulated carriers in the transportation business. As a sponsor of the floor amendment which eventually became Section 203(b)(5) explained, it was not the intent of his amendment to "open the gates" for carriage performed under the guise of a regulatory exemption, but rather to provide a means of "reducing the marketing expenses of members" of the

cooperative. (Statement of Representative Jones, 79th Cong. Rec. 12218-20 (1935).) That proviso has often been cited by the ICC in proceedings involving the transportation operations conducted by cooperative associations. See, *e.g., Machinery Haulers Assn.* v. *Agricultural Commodity Serv.,* 86 M.C.C. 5, 14 (1961). In 1968, Congress reaffirmed that only farmer members are to be the primary beneficiaries of exempt transportation performed by agricultural cooperatives. Section 203(b)(5) was amended in that year so as to limit the type of nonmember, nonexempt traffic a cooperative could handle to that which was "incidental to its primary transportation operation and necessary for its effective performance" and, in no event, was such traffic in any fiscal year to exceed 15 percent of its total interstate transportation tonnage.[1]

Consistent with these statutes, the Commission and the federal courts previously have construed narrowly the extent to which agricultural cooperatives may provide transportation services pursuant to Section 203(b)(5). See, *e.g., Agricultural Transportation Assoc.* v. *Florida Public Service Comm.,* 108 M.C.C. 96 (1968) (limiting the extent to which agricultural cooperatives can engage in exempt transportation by the use of leased vehicles); *ICC* v. *KSI Farm Lines Co-op, Inc.,* 407 F. Supp. 145 (E.D. Wis. 1976) (finding an alleged cooperative to be a sham on the ground that its transportation was primarily performed on behalf of nonmembers); *ICC* v. *Milk Producers Marketing Co.,* 405 F. 2d 639 (10th Cir. 1969) (holding

[1] 82 Stat. 448, amending Section 203(b)(5), 49 U.S.C. § 303(b)(5).

that back-to-back hauling of general commodities for nonmembers throughout the United States does not meet the incidental and necessary test of Section 203 (b)(5).) Each of those decisions evidences ICC compliance not only with the above described Congressional intent, but also with the rule adopted by this Court of strictly construing the various exemptions to the Interstate Commerce Act. *Spokane and Inland Empire Railroad Co.* v. *U.S.*, 241 U.S. 344 (1916); *Piedmont and Northern R. Co.* v. *ICC*, 286 U.S. 299 (1931).[2]

The decision of the Court of Appeals in this case both fails to provide the mandated strict construction of the agricultural cooperative exemption, and provides an unwarranted enlargement of the degree to which cooperatives can lawfully provide transportation to nonfarmers. Prior to the Court's decision, it was undisputed that Section 203(b)(5) requires that membership in agricultural cooperatives be limited to producers of agricultural commodities, *i.e.*, farmers. *ICC* v. *All-American Association, supra; Machinery Haulers Association* v. *Agricultural Commodity Service, supra.* Thus, the ICC defined a "member" in its regulations implementing the 1968 amendment to Section 203(b)(5) as "any farmer or cooperative association . . . ." 49 C.F.R. § 1047.20(c). Yet, the decision of the Court of Appeals permits Sunkist to join

[2] The policy underlying the rule of strict construction for exemptions was explained by this Court in *Piedmont and Northern R. Co.* v. *ICC*, as follows:

> The Transportation [Interstate Commerce] Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended. (286 U.S. at 311).

a cooperative for the sole purpose of transporting goods which, under the terms of sale f.o.b. packinghouse (origin), are owned by nonfarmer, nonmember wholesalers, jobbers and chain stores.[3] Anomalously, the decision grants parties not entitled to membership in a cooperative the same rights as members. Hence, the heretofore major limitation on the operations of agricultural cooperatives, namely, that they be operated for the benefit of farmer members, has been extinguished.

The result of the decision of the Court of Appeals will be to promote an unwarranted incursion into the traffic handled nationwide by the regulated carrier industry, thereby disrupting the stability which Congress sought to provide for that industry. Any agricultural cooperative is now enabled to inflate the amount of "nonmember transportation" it can transport by an amount equal to that shifted to the member category, without any danger of exceeding the ratio of member/nonmember business a cooperative is required to maintain. So too, the increased traffic a cooperative could handle would thereby increase its interstate tonnage base, and, therefore, the amount of nonmember, nonexempt transportation that can be handled under the 15 percent limitation.

Judge Tamm recognized in dissent that the majority's decision confused well developed interstate commerce law establishing the balance between regulated and unregulated carriage. He stated that: "[U]nder the Commission's decision as affirmed by the majority . . . it is the nonmember buyers who will reap

[3] No party disputes the fact that ownership of the commodities to be transported rests with wholesalers, jobbers and chain stores.

whatever savings in freight costs the cooperative shipping will produce. This is not the mutually beneficial relationship contemplated by either Section 1141j(a) of the Agricultural Marketing Act or Section 203(b)(5) of the Interstate Commerce Act." (Dissenting Memorandum, p. 3).

Petitioners submit that Judge Tamm's analysis of the majority opinion is correct. The decision of the Court of Appeals amounts to a repeal of unambiguous statutory law, and a flouting of the Congressional expressions of the intent underlying that law. Only a definitive ruling by this Court can rectify that unjustifiable result and restore the intended stable competitive balance between regulated and unregulated carriage.

B. The Court of Appeals Has Decided a Federal Question in a Way Which Conflicts with the Applicable Decision of This Court

In *Pacific Coast,* this Court established a test to measure whether the transportation services performed by an alleged shipper association qualify for the statutory exemption from Commission freight forwarder regulation conferred upon such organizations pursuant to Section 402(c) of the Interstate Commerce Act.[4] The "nature of the relationship" between the association and its shipper members was the benchmark estab-

[4] The ICC regulates freight forwarders pursuant to Part IV of the Interstate Commerce Act, 49 U.S.C. §§ 1001-1022. Section 402(c), 49 U.S.C. § 1002(c), provides that, as pertinent, "the provisions of this part shall not be construed to apply (1) to the operations of a shipper, or a group of shippers, in consolidating or distributing freight for themselves, or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates . . . ."

lished by this Court to determine whether, as required by Section 402(c), the benefits of the association's activities were conferred upon the shipper members of the association.

Substantively. that same test is applicable to a determination of whether the transportation performed by an agricultural cooperative association is "member" or "nonmember" transportation under Section 203(b)(5) of the Interstate Commerce Act and the Commission's regulations in 49 C.F.R. § 1047.20. See, *e.g., Machinery Haulers Association* v. *Agricultural Commodity Serv., supra* (wherein the Commission analyzed membership in a cooperative in terms of the beneficiaries of the transportation services). Under the Commission's own definitions of those terms, the nature of the relationship between the cooperative, as the provider of transportation, and the beneficiary of that transportation is the focal point in the determination of whether member or nonmember transportation is involved. Transportation performed "for" farmer members in their capacities as producers of agricultural commodities is "member transportation", while all other transportation is "nonmember transportation." Compare 49 C.F.R. § 1047.20(f) with § 1047.20(g).

Nonetheless, in this case the Court of Appeals erroneously ignored, as had the ICC, the nature of the relationship created between the cooperative and its members as to the involved transportation services.

The Court of Appeals, ostensibly relying on *Pacific Coast,* excised the following language from the decision:

> There is nothing in the language of the Act or the legislative history to suggest that Congress in-

tended the exemption to turn on the type of shipment which was involved, whether f.o.b. origin or f.o.b. destination (delivered price). (338 U.S. at 691).

What the Court of Appeals failed to cite was the passage immediately succeeding the quoted sentence which reads:

> On the contrary, *it is clear that the nature of the relationship between the members and the group was thought to be determinative.* Under that test, the valid claim of the association to the statutory exemption is established by the original Commission decision. (Emphasis added). (338 U.S. at 691).

That the Court of Appeals relied only on the first passage indicates that it decided the issues in this case without reference to how the terms of sale affected the critical "nature of the relationship" between the cooperative and its members. Rather, like the Commission, the Court of Appeals held that *Pacific Coast* mandates a finding that the fact that the proposed shipments are made f.o.b. packinghouse (origin) has no bearing on the question of compliance with Section 203(b)(5).

The error of the Court of Appeals lies in its removing the passage it quotes from its proper context. The *Pacific Coast* litigation stemmed from a Commission decision which found that transportation services performed by a shipper association as to shipments handled on an f.o.b. destination basis were of primary benefit to nonmembers of the association, while transportation services as to shipments handled on an f.o.b. origin basis primarily benefited members. The Commission thereby held that the association qualified for exemption from freight forwarder regulation only as to the latter type of shipment.

In reversing the Commission and finding that the association was at all times acting as agent for its members, a three-judge District Court noted that:

> Here the determinative inquiry is not as to agency as between consignor-seller and consignee-member (cf. Adams v. Mills, 1932, 286 U.S. 397, 406, 407, 52 S.Ct. 589, 76 L.Ed. 1184), but as to the agency relationship between both or either of them and the association. And the facts found by the Commission admit of but one conclusion as to this: That the association at all times acts solely at the request, and under the direction, and for the account and benefit, of the member-purchaser. As between member and association, then, the former always acts as principal, the latter as agent.
>
> The existence of this agency is implicit in the findings of the Commission. The report states that "All of the shipments involved are consigned * * * upon instructions of the members" of the association. Admittedly, the facilities of the association are not available to a non-member shipper otherwise than through arrangements made by a member. And the necessary arrangements are that the member as principal instruct the association as agent to handle the shipment. Moreover, both the purpose and the result of the transaction is not to benefit the shipper, but to reduce transportation costs to the member through savings effected in cooperation with other members who likewise employ the association as transportation agent. (*Pacific Coast Wholesalers Assn.* v. *U. S.*, 81 F. Supp. 991, 995-996 (W.D. Cal. 1949).

Affirming the District Court opinion, this Court molded the rationale of the lower court into the "nature of the relationship" test. 338 U.S. 689, 691 (1950).

In so doing, this Court did *not* hold that the terms of sale are never relevant in determining whether certain transportation services are exempt under the Interstate Commerce Act, but rather held that the applicability of the exemption was to be tested according to whether the beneficaries of the transportation services were those parties intended to be benefited by the statute. As the lower court opinion made clear, the terms of sale in the case before it did not alter the relationship between association and member, *i.e.*, the terms of sale did not affect the key fact that the shippers were at all times the beneficiaries of the association's activities.

Contrast the instant case. Here, the terms of sale define the nature of the relationship between cooperative and member. In the agricultural cooperative context, a shipment transported by a cooperative on an f.o.b. packinghouse (origin) basis creates no relationship whatever between the cooperative and its members, but rather creates an agency relationship between the cooperative and the nonmembers for whose account the service of the cooperative is provided. Sunkist will here secure transportation services from the cooperative association at the request and direction of the nonmember wholesalers, jobbers and chain stores, and it is solely for their account that the service will be obtained. Sunkist is acting on behalf of the nonfarmer purchasers, and all direct and discernible benefits flowing from the transportation arrangements proposed are for those parties.

In short, had the Court of Appeals applied the "nature of the relationship" test to the instant facts, it would have concluded that the transportation performed by Sunkist was "nonmember transportation"

subject to the limitations which are statutorily applicable to that character of transportation. It was clear to Judge Tamm that petitioners' position "is consistent with the holding of *United States* v. *Pacific Coast Wholesalers' Ass'n.*, 338 U.S. 689 (1950), that 'the nature of the relationship' between the member and the association is determinative . . ." on the question of whether the proposed shipments constitute "member transportation."

The unnatural construction the Court of Appeals below gave to *Pacific Coast* requires that this Court clarify the scope of that decision. Moreover, that the majority of the Court of Appeals reached a result inconsistent with the reasoned policy of this Court mandates that this petition be granted so that the question of the continued vitality of the "nature of the relationship" test may be addressed.

PRAYER

Petitioners submit that the foregoing establishes the presence of "special and important" reasons for granting this petition for certiorari which, pursuant to Rule 19 of the Rules of this Court, is the necessary predicate for such a grant.

Wherefore, petitioners pray the Court to grant this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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February 22, 1977

APPENDIX

APPENDIX A

No. MC-C-8200

SUNKIST GROWERS, INC., PETITION FOR DECLARATORY ORDER— "MEMBER TRANSPORTATION"

Decided March 28, 1975

Upon petition, shipments of agricultural commodities made on an f.o.b. packinghouse basis by a member of an agricultural cooperative association, which are carried in interstate commerce on motor vehicles controlled and operated by that association found to constitute member transportation within the meaning of section 203(b)(5) of the Interstate Commerce Act. Proceeding discontinued.

Barry Roberts and *Dickson R. Loos* for petitioner.

L. C. Cypert, William J. Lippman, and *Robert E. Michelson* for parties in support of the petition.

John R. Bagileo, Peter T. Beardsley, Nelson J. Cooney, Robert L. James, Marion F. Jones, and *Bryce Rea, Jr.,* for parties in opposition to the relief sought.

Report of the Commission

DIVISION 1, COMMISSIONERS MURPHY, GRESHAM, AND MACFARLAND

BY THE DIVISION:

By petition filed November 8, 1972, Sunkist Growers, Inc., of Van Nuys, Calif., seeks a declaratory order affirmatively finding that shipments of agricultural commodities

made on an f.o.b. packinghouse basis by a member of an agricultural cooperative association, which are transported in interstate commerce in motor vehicles controlled and operated by that agricultural cooperative association, constitute member transportation within the meaning of the provisions of section 203(b)(5) of the Interstate Commerce Act [49 U.S.C. 303(b)(5)], as amended.

Under section 203(b)(5),[1] an "agricultural cooperative association" may, without authority from this Commission, transport both exempt commodities under section 203(b)(6) and nonexempt commodities for its members. In addition, it may perform limited transportation services for nonmembers. Transportation, not otherwise exempt, performed for nonmembers who also are not farmers, cooperatives, or federations thereof, must be incidental to

[1] Section 1 of Public Law 90-433 (82 Stat. 448), which became effective July 26, 1968, amended section 203(b)(5) of the Interstate Commerce Act. As here pertinent, that section now reads as follows:

(b) Nothing in this part, except the provisions of section 204 • • • shall be construed to include • • • (5) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined, but any interstate transportation performed by such a cooperative association or federation of cooperative associations for nonmembers who are neither farmers, cooperative associations, nor federations thereof for compensations, except transportation otherwise exempt under this part, shall be limited to that which is incidental to its primary transportation operation and necessary for its effective performance and shall in no event exceed 15 per centum of its total interstate transportation services in any fiscal year, measured in terms of tonnage • • •. *And provided further,* That in no event shall any such cooperative association or federation • • • transport interstate for compensation in any fiscal year of such association or federation a quantity of property for nonmembers which, measured in terms of tonnage, exceeds the total quantity of property transported interstate for itself and its members in such fiscal year • • •.

the cooperative's primary transportation operation and may not exceed 15 percent of its total interstate tonnage during any fiscal year. In no event, however, may nonmember traffic (be it otherwise exempt or nonexempt) exceed its member traffic, measured in terms of tonnage, during any fiscal year.

The petition was filed pursuant to 5 U.S.C. 554(e) (the Administration Procedure Act), which permits this Commission, in its discretion, to issue declaratory orders to terminate controversies or to remove uncertainties. Notice of its filing was published in the Federal Register of December 28, 1973; and in the Federal Register of January 11, 1974, persons desiring to participate in the proceeding were invited to file representations supporting or opposing the relief sought by February 11, 1974. Representations in support of the petition were filed on behalf of United Agricultural Transportation Association of America Marketing Co-op and Blue Star Growers Co-op, Inc., jointly. By petition filed January 15, 1974, Middle & Western Farms Cooperative Association seeks leave to intervene on behalf of petitioner.

Representations in opposition to the determination sought by petitioner were filed separately by American Trucking Associations, Inc. (ATA), jointly by National Motor Freight Traffic Association, Inc. (NMFTA), Regular Common Carrier Conference (RCCC), and Common Carrier Conference-Irregular Route (CCC), and jointly by motor carriers Denver-Albuquerque Motor Transport, Inc., and Bray Lines Incorporated.

On March 15, 1974, petitioner tendered additional representations purporting to clarify its earlier statement. ATA, by motion filed March 28, 1974, moves to strike from the record the additional representations submitted by petitioner, and on the same date Denver-Albuquerque and Bray jointly filed a response to such representations.

On April 3, 1974, NMFTA, RCCC and CCC jointly filed a response to petitioner's additional representations, challenging their admissibility.

PROCEDURAL MATTER

First, the participation of Middle & Western in this proceeding will be allowed inasmuch as no party will be adversely affected by such action and as such participation will not unduly delay the proceeding in any respect. Second, ATA's motion to strike the additional representations submitted by petitioner on March 15, 1974, will be overruled. Such representations tend to clarify the issue presented; and, in view of our discussion below, their acceptance will not prejudice parties opposing petitioner's position.

BACKGROUND

In enacting section 203(b)(5) of the act, as amended, Congress excused from economic regulation the transportation activities of bona fide farmer cooperatives and federations thereof in order to foster the growth and development of such cooperatives in the public interest and in accordance with the announced purposes of the Agricultural Marketing Act (12 U.S.C. 1141, *et seq.*), as set forth in that statute.[2] The Congress did not, however,

[2] The congressional intention is reflected at 12 U.S.C. 1141, as follows:

Declaration of Policy—(a) It is hereby declared to be the policy of Congress to promote the effective merchandising of agricultural commodities in interstate and foreign commerce, so that the industry of agriculture will be placed on a basis of economic equality with other industries, and to that end to protect, control and stabilize the currents of interstate and foreign commerce, in the marketing of agricultural commodities and their food products—

(1) By minimizing speculation.

intend to allow such cooperative associations freely to engage in the interstate transportation of nonexempt commodities and thereby to encroach upon the business of regulated motor carriers. See 79 Cong. Rec. 12218-12220, July 31, 1935.

Petitioner is an agricultural cooperative association as defined by the Agricultural Marketing Act.[3] It is presently engaged in the promotion, marketing, and distribution of fresh citrus fruits (exempt agricultural commodities under section 203(b)(6) of the act) on behalf of members of its cooperative association. In this capacity Sunkist operates packinghouses at which the exempt commodities are cleaned, graded, and packaged for distribution.

Sales of fresh fruit are made f.o.b. the packinghouse to buyers—consignees such as wholesalers, jobbers, and chainstores (nonfarmers). Under this arrangement consignees assume the risks of market fluctuation during shipping, loss, damage, spoilage in transit, and payment

(2) By preventing inefficient and wasteful methods of distribution.

(3) By encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies.

(4) By aiding in preventing and controlling surpluses in any agricultural commodity, through orderly production and distribution so as to maintain advantageous domestic markets and prevent such surpluses from causing undue and excessive fluctuations or depressions in prices for the commodity.

[3] Among other things, that Act provides: "* * * as used in this subchapter, the term 'cooperative association' means any association in which farmers act together in processing, preparing for market, handling and/or marketing the farm products of persons so engaged * * *. 12 U.S.C. § 1141j.

of freight charges. In the majority of cases the consignee makes its own transportation arrangements, but often Sunkist selects the carrier and controls the routing.

Sunkist has experienced some difficulty in obtaining adequate transportation service from for-hire carriers on such movements. Therefore, it is considering affiliation with one or more other agricultural cooperatives providing transportation facilities. As a "member" of such an agricultural cooperative, Sunkist, on those shipments for which it arranges transportation, could obtain service in vehicles owned and controlled by the cooperatives.

Issue Raised by the Petition

The question presented is whether such shipments (under the terms of sale indicated above) would constitute "member transportation" as defined in 49 CFR 1047.20 (f).[4] An affirmative finding in this regard would generally enable all of the traffic of the cooperative supplying the motor vehicle to remain exempt from the licensing requirements of Part II of the act under section 203 (b) (5). Were such traffic considered "nonmember," on the other hand, the transportation thereof by that cooperative could constitute no more than 50 percent of the total tonnage of the agricultural cooperative in each fiscal year under the third proviso of section 203(b)(5). The determination as to whether this is member or nonmember transportation would also effect the total tonnage of nonmember traffic not otherwise exempt which could be transported by the agricultural cooperative under the 15-percent limitation in that same section.

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[4] That definition reads as follows: "*Member transportation.* The term 'member transportation' means transportation performed by a cooperative association or federation of cooperative associations for itself or for its members, but does not include transportation performed in furtherance of the nonfarm business of such members."

Positions of the Parties

Petitioner and those supporting its position argue that the traffic at issue is member traffic because it is to be transported for petitioner, who would be a member of the agricultural cooperative performing farm-related operations. It is asserted that as petitioner will control the incidents of transportation, it is the shipper, citing *Administrative Ruling No. 76,* 117 M.C.C. 433 (1972). It was found in that case that contract carriers by motor vehicle under contract with consignors, whose freight charges were paid by noncontracting consignees, were not in violation of the prohibition against performing transportation services for persons other than contracting parties when the consignors controlled the routing and thus were shippers. Sunkist contends that an affirmative finding herein would be consistent with the purpose of the agricultural cooperative exemption since it would assure an adequate supply of motor transportation facilities for its members. The fact that movements of agricultural commodities from packinghouse to markets are an essential part of the business of farmers, it is argued, requires the conclusion that in essence the transportation is made on behalf of member farmers and, therefore, is exempt transportation. The mere fact that the commodities are sold f.o.b. the packinghouse assertedly does not preclude a finding that the transportation service is actually performed for Sunkist.

Parties opposing the declaratory relief requested take the position that Sunkist could not be a "member" of an agricultural cooperative because it is a processor of agricultural commodities, and thus, not a farmer member. Citing *I.C.C.* v. *All-American Association,* 281 F. Supp. 18 (N.D. Tex. 1968), parties opposed to the relief sought point out that since petitioner's pertinent activity is, operation of a packinghouse, it is performing a nonfarming operation as contemplated by the provisions of 49 CFR 1047.20(f) and (g). It was held in that case

that transportation performed for a member of an agricultural cooperative which operated a meat packinghouse was not member transportation because the member was not engaged in farming operations. Even assuming that the operation of a packinghouse is a bona fide membership operation, replicants assert that the considered operation constitutes nonmember transportation since the terms of sale are f.o.b. packinghouse and the movements are, therefore, made on behalf of nonmember consignees.

Discussion and Conclusions

We must first decide whether Sunkist qualifies for membership in a cooperative association. As noted earlier, it operates packinghouses at which fresh citrus fruits are cleaned, graded, and packaged for distribution. We are satisfied that Sunkist qualifies for such membership. In *Edgerton Coop. Oil Assn.—Investigation,* 105 M.C.C. 100 (1967), this Commission reversed a joint board which had found that an agricultural cooperation association composed of other agricultural cooperative associations was not a true association within the meaning of section 203(b)(5). At page 105 of that report, the Commission stated:

> We cannot accept the interpretation given section 203(b)(5) by the joint board which holds respondent to be a hybrid organization outside the scope of the statutory exemption and thus not entitled to the benefits thereof because among members are both independent cooperative associations as well as individual farmers. As noted above the Agricultural Marketing Act defines a cooperative association as one in which member farmers act together for their mutual benefit as producers or marketers of farm products or as purchasers of farm supplies and farm business services. The term "farmers" as used in the statute includes not only individuals but also corporations, partnerships, and other business entities. • • •

Section 203(b)(5) was amended in 1968. The effect of that amendment was merely to incorporate the 15-percent rule with respect to transportation which is incidental to the primary transportation operation and necessary for its effective performance. Nevertheless, we believe the amendment is important from another standpoint. When the Congress considered the section of the act to which the *Edgerton* decision applies, no action was taken to alter its effect.

Parties in opposition to the relief sought rely on the fact that in *I.C.C.* v. *All-American Association, supra,* the court held that operation of a meat packinghouse did not constitute farming operations. The commodities involved in this proceeding are not processed products, as are products of meat packinghouses, but rather are packaged agricultural commodities in their natural state. Meat packinghouses convert exempt commodities (livestock) into nonexempt meat products by slaughtering, cutting, dressing, chilling, freezing, and other operations. On the other hand, Sunkist's operations consist primarily of preparing the commodities for market by cleaning, grading, and packing. Commodities moving from Sunkist's packinghouses thus retain their character as exempt agricultural commodities.

Replicants' contention that shipments made on an f.o.b. packinghouse basis are made on behalf of nonmember consignees, and, therefore, constitute nonmember transportation, is likewise without merit. Nothing in section 203(b)(5) of the act, its legislative history, implementing regulations, or subsequent Commission and court decisions deals precisely with this issue. We believe, however, that we are on firm ground in rejecting applicants' arguments on this point. In *Pacific Coast Wholesalers Assn.* v. *United States,* 81 F. Supp. 991 (S.D. Cal. 1949), affirmed *per curiam, U.S.* v. *Pacific Coast Wholesalers,* 338 U.S. 689 (1950), the court reversed a prior Commission determi-

nation in *Pacific Coast Wholesalers' Assn., Investigation of Status,* 269 I.C.C. 504 (1947), that a nonprofit shippers association transporting supplies for its members on a delivered price or f.o.b. destination basis was subject to regulation as a freight forwarder under Part IV of the act and not exempt under section 402(c) thereof.[5] More importantly, in affirming the lower court the Supreme Court stated the following at page 691 of its decision.

> There is nothing in the language of the Act or the legislative history to suggest that Congress intended the exemption to turn on the type of shipment which was involved, whether f.o.b. origin or f.o.b. destination (delivered price).

We believe the same thing holds true here. This conclusion is not based solely on the rationale of a decision upon which petitioner heavily relies, *Administrative Ruling No. 76, supra.* There the Commission clarified and corrected a rule to the effect that payment of freight charges gives rise to a presumption of control over the transportation involved. Rather, our decision here is based more on the apparent intention of the Congress, as reflected in a somewhat parallel situation in the *Pacific* case, *supra,* not to have this Commission differentiate in these circumstances between two types of shipments as parties opposed to the relief sought would have us do. For the reasons stated above we believe that the discussed traffic does constitute "member transportation" as defined in 49 CFR 1047.20(f).

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[5] Section 402(e) provides, as pertinent, that "(t)he provisions of this part [part IV] shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates • • •."

FINDINGS

We find, on the basis of the facts of record, that Sunkist Growers, Inc., is qualified for membership in an agricultural cooperation association as defined in section 203 (b)(5) of the Interstate Commerce Act, and that were it to join such a cooperative, shipments of packed citrus fruits sold f.o.b. its plantsite would constitute member transportation within the meaning of the statute.

We further find that the decision here is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D.C., on the 28th day of March, 1975.

No. MC-C-8200

SUNKIST GROWERS, INC., PETITION FOR DECLARATORY ORDER--"MEMBER TRANSPORTATION"

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusion thereon, which report is made a part hereof:

It is ordered, That Middle & Western Farmers Cooperative Association be, and it is hereby, permitted to participate in this proceeding; and that the motion of American Trucking Associations, Inc., to strike the additional representations of petitioner be, and it is hereby, overruled for the reasons set forth in said report.

And it is further ordered, That the said proceeding be, and it is hereby, discontinued.

By the Commission, division 1.

ROBERT L. OSWALD,
Secretary

[SEAL]

APPENDIX B

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D.C., on the 23rd day of July, 1975.

No. MC-C-8200

SUNKIST GROWERS, INC., PETITION FOR DECLARATORY ORDER—
"MEMBER TRANSPORTATION"

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Joint petition of National Motor Freight Traffic Association, Inc., Regular Common Carrier Conference, and Common Carrier Conference—Irregular Route, filed May 12, 1975, for reconsideration;

(2) Tendered petition of American Trucking Associations, Inc., submitted for filing on May 13, 1975, for reconsideration;

(3) Reply by petitioner filed June 2, 1975, to the petitions in (1) and (2) above;

(4) Reply by United Agricultural Transportation Association of American Marketing Co-op, filed June 2, 1975, to the petitions in (1) and (2) above;

and good cause appearing therefor:

It is ordered, That the said tendered petition be, and it is hereby, accepted for filing.

It is further ordered, That the petitions in (1) and (2) above be, and they are hereby, denied, for the reasons that the pleadings present no new or material matters of fact or law not adequately considered and properly disposed

of March 28, 1975, in the above-entitled proceeding, which findings are in accordance with the evidence and the applicable law, and that no sufficient or proper cause appears for granting the relief sought.

By the Commission, Division 1, Acting as an Appellate Division.

ROBERT L. OSWALD,
Secretary

[SEAL]

APPENDIX C

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D.C., on the 28th day of August, 1975.

No. MC-C-8200

SUNKIST GROWERS, INC., PETITION FOR DECLARATORY ORDER—
"MEMBER TRANSPORTATION"

Upon consideration of the record in the above-entitled proceeding, and of joint petition of National Motor Freight Traffic Association, Inc., Regular Common Carrier Conference, and Common Carrier Conference—Irregular Route, protestants, filed August 18, 1975, for a determination and announcement that the proceeding involves an issue of general transportation importance;

It is ordered, That the said petition be, and it is hereby, denied, for the reason that in the judgment of the Commission no issue of general transportation importance is involved.

By the Commission,

ROBERT L. OSWALD,
Secretary

[SEAL]

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976

No. 75-1934

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,
REGULAR COMMON CARRIER CONFERENCE and
COMMON CARRIER CONFERENCE—IRREGULAR ROUTE,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, *Respondents*

SUNKIST GROWERS, INC.
ASSOCIATION OF AMERICAN RAILROADS, *Intervenors*

PETITION FOR REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION

Before: Bazelon, Chief Judge, Tamm and Robb, Circuit Judges

Judgment

This cause came on to be heard on a petition for review of an order of the Interstate Commerce Commission and was argued on behalf of the parties. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c).

On consideration of the foregoing and the Court being of the opinion that *United States* v. *Pacific Coast Wholesalers,* 338 U.S. 689 (1950), which held "[t]here is nothing in the language of the Act or the legislative history to suggest that Congress intended the (member transportation) exemption to turn on the type of shipment which was involved, whether f.o.b. origin or f.o.b. destination," provides ample support for the decision reached, it is

ORDERED AND ADJUDGED by this Court that the order of the Interstate Commerce Commission under review herein is hereby affirmed.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Dissenting memorandum of Circuit Judge Tamm attached.

Memorandum

TAMM, *Circuit Judge*, dissenting: The petitioners, National Motor Freight Traffic Association, Inc. (NMFTA) and others, seek review of an Interstate Commerce Commission decision that shipments of citrus fruits on an f.o.b. packinghouse (origin) basis by a member of an agricultural cooperative association which transports the fruit constitute "member transportation" within the meaning of section 203(b)(5) of the Interstate Commerce Act. 49 U.S.C. § 303(b)(5) (1970). The majority's affirmance by order of this agency decision is contrary to the legislative policy of section 1141j(a) of the Agricultural Marketing Act, 12 U.S.C. § 1141j(a) (1970), and section 203(b)(5) of the Interstate Commerce Act and the Commission's own regulations promulgated thereunder.

The legislative intent behind the Agricultural Marketing Act was to encourage the organization and operation of farm cooperatives so that farm products could be effectively merchandised. 12 U.S.C. § 1141 (1970); *Northwest Agricultural Cooperative Ass'n* v. *ICC*, 350 F.2d 252 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966). The benefits derived from south cooperatives were meant to run directly to the member farmers. 12 U.S.C. § 1141j(a) (1970). The terms of the f.o.b. origin shipment contract involved in this case indicate, and all parties readily acknowledge, that the cooperative association is transporting fruit which is owned by the purchasers of the fruit—assorted jobbers, wholesalers and chain stores who are not members of the cooperative. It is clearly evident therefore that the transportation here is being performed for the benefit of nonmembers.

This directly conflicts with the Commission's own regulations which define "member transportation" as "transportation performed by a cooperative association . . . for itself or *for its members.*" 49 C.F.R. § 1047.20(f) (1975) (emphasis added). Transportation "for members" means

that the *members'* property must be the subject of shipment, not someone else's property. The regulations specifically state that cooperative associations may transport only their *own property* or their *members' property* without regard to the limitations imposed upon nonmember transportation. 49 C.F.R. § 1047.21 (1975). In order to come within the designated definition of "member transportation" then, the cooperatives must be transporting their own fruit or that of their members. As stated previously, all the incidents of ownership of the fruit in question here no longer are in the member farmers, and therefore the subsequent transportation constitutes "nonmember transportation."

This result is consistent with the holding of *United States* v. *Pacific Coast Wholesalers' Ass'n*, 338 U.S. 689 (1950), that the "nature of the relationship" between the members and the association is determinative. All the pertinent legislation and regulations indicate that the cooperative relationship was meant to be one of direct benefit to the farmer members. Under the Commission's decision as affirmed by the majority, however, it is the nonmember buyers who will reap whatever savings in freight costs the cooperative shipping will produce. This is not the mutually beneficial relationship contemplated by either section 1141j(a) of the Agricultural Marketing Act or section 203(b)(5) of the Interstate Commerce Act.

For these reasons I would reverse the decision of the Interstate Commerce Commission.

APPENDIX E

Text of Relevant Statutes and Regulations

STATUTES:

Agricultural Marketing Act, Section 1141j(a), 12 U.S.C. § 1141j(a):

> As used in this subchapter, the term "cooperative association" means any association in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, and also means any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services: *Provided, however*, That such associations are operated for the mutual benefit of the members thereof as such producers or purchasers and conform to one or both of the following requirements:
>
> First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; and
>
> Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.
>
> And in any case to the following:
>
> Third. That the association shall not deal in farm products, farm supplies, and farm business services with or for nonmembers in an amount greater in value than the total amount of such business transacted by it with or for members. All business transacted by any cooperative association for or on behalf of the United States or any agency or instrumentality thereof shall be disregarded in determining the volume of member and nonmember business transacted by such association.

Interstate Commerce Act, Section 203(b)(5), 49 U.S.C. § 303(b)(5):

> Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined, but any interstate transportation performed by such a cooperative association or federations of cooperative associations for nonmembers who are neither farmers, cooperative associations, nor federations thereof for compensation, except transportation otherwise exempt under this part, shall be limited to that which is incidental to its primary transportation operation and necessary for its effective performance and shall in no event exceed 15 per centum of its total interstate transportation services in any fiscal year, measured in terms of tonnage: *Provided,* That, for the purposes hereof, notwithstanding any other provision of law, transportation performed for or on behalf of the United States or any agency or instrumentality thereof shall be deemed to be transportation performed for a nonmember: *Provided further,* That any such cooperative association or federation which performs interstate transportation for nonmembers who are neither farmers, cooperative associations, nor federations thereof, except transportation otherwise exempt under this part, shall notify the Commission of its intent to perform such transportation prior to the commencement thereof: *And provided further,* That in no event shall any such cooperative association

or federation which is required hereunder to give notice to the Commission transport interstate for compensation in any fiscal year of such association or federation a quantity of property for nonmembers which, measured in terms of tonnage, exceeds the total quantity of property transported interstate for itself and its members in such fiscal year.

REGULATIONS:

Interstate Commerce Commission, Transportation And Notice Thereof By Agricultural Cooperation Association.

49 C.F.R. § 1047.20, Definitions:

§ 1047.20(c) Member. The term "member" means any farmer or cooperative association which has consented to be, has been accepted as, and is a member in good standing in accordance with the constitution, by laws, or rules of the cooperative association or federation of cooperative associations.

§ 1047.20(d) Farmer. The term "farmer" means any individual, partnership, corporation or other business entity to the extent engaged in farming operations either as a producer of agricultural commodities or as a farm owner.

§ 1047.20(f) Member transportation. The term "member transportation" means transportation performed by a cooperative association or federation of cooperative associations for itself or for its members, but does not include transportation performed in furtherance of the nonfarm business of such members.

§ 1047.20(g) Nonmember transportation. The term "nonmember transportation" means transportation performed by a cooperative association or federation of cooperative associations other than member transportation as defined in (f) above.